SUPREME COURT OF NEW YORK.[1]

Railroads in Cities; Rights of Property-owners; Power of the Legislature over Streets, and Right to grant Franchises therein; Fee of the Streets—Constitutionality and Validity of Act of April 17, 1860, *chartering Broadway Railroad Company.*—The legislature, in passing the Act of April 17, 1860, authorizing the construction of a railroad in the Seventh Avenue, and in certain other streets, &c., in the city of New York, assumed the right to grant the franchise absolutely and unconditionally, so far as the occupation of the streets and avenues for the purposes of the railroad was involved, without compensation being made to the owners of any interest in the land forming the streets: *The People and others* vs. *Kerr and others, and the Mayor, &c., of the City of New York.*

The act is not void as being repugnant to the constitutional prohibition against the taking of private property for public use, without compensation: *Id.*

The fee of the streets and avenues resides in the corporation of the city of New York, in trust, to be kept open for ever as streets for the use of the public: *Id.*

The trust vested in the corporation proceeded from the sovereign power, either of the crown of Great Britain, or of the state of New York, or from both; and exists for the use and benefit of all the people of the state, who are the beneficiaries or *cestuis que trust* for whom the trust was created, and by whom, through their legislature, it is sustained and continued: *Id.*

The power to exempt the grantees from the payment of any damages or compensation for the franchise granted by the Act of April 17, 1860, was clearly within the scope of legislative authority: *Id.*

The occupation of the streets for the purpose of constructing and operating the railroad authorized by that act, does not involve the *taking* of property, in such a sense as to come within the prohibition of the constitution; which implies, first, a private owner; second, a taking from him; and, third, the property or thing taken having the legal qualities of property, and the owner's interest in which is capable of legal estimate: *Id.*

The streets are not in the hands of private owners, and what is authorized by the act to be taken is not private property. The grant in the statute is of a franchise. And the act authorizing the grantees to construct and operate the railroad is a mere legislative license to do so: *Id.*

[1] From the Hon. O. L. Barbour, Reporter; to appear in the 37th volume of his Reports.

The state legislatures have unlimited power over public rights in highways; and can obstruct, modify, impair, or extinguish them, as to any highway, or portion of a highway, except so far as the state power is qualified by the commercial clause in the Constitution of the United States, without making any compensation to individuals for resulting or consequential damages: *Id.*

It also had the constitutional power to authorize the grantees to construct and operate the railroad, through or upon the streets of the city, without the consent of the city corporation: *Id.*

Compulsory Arbitrations.—The legislature has no right to direct a municipal corporation to pay a claim for damages for breach of a contract, out of the funds or property of such corporation, without a submission of such claim to a judicial tribunal: *The People, ex rel. Baldwin et al.*, vs. *Haws, Comptroller of the City of New York.*

Where the law *compels* a party to arbitrate, upon a claim which properly should be the subject of an action, without his assent, such law deprives him of the right which is secured by the constitution, of a trial according to the course of the common law; and performance of the award will not be enforced by mandamus: *Id.*

SUPREME COURT OF MASSACHUSETTS.[1]

Mortgage—Homestead Exemption—Sale under Power.—A mortgage of land which is subject to a right of homestead conveys the reversionary interest of the mortgagor, after the expiration of the homestead estate, although his wife did not join therein: *Smith* vs. *Provin.*

The mortgagee of a reversionary interest in land may maintain a bill in equity to redeem a prior mortgage: *Id.*

No title passes by a sale under a power of sale contained in a mortgage, unless the conditions thereof are strictly complied with: *Id.*

Agent—Action against by Principal.—A principal may recover, in an action of tort against his agent, for all the damages caused by the latter's breach of duty, including his neglect to pay over on demand money which he has collected as agent: *Ashley* v. *Root.*

Forged Signature — Adoption of — Evidence of Adoption — Letter mailed.—By ratifying and adopting a forged signature upon commercial paper, the person whose signature has been forged becomes liable thereon, although no words of agency appear upon the paper, and no facts are

[1] From Charles Allen, Esq., Reporter; to appear in the 4th volume of his Reports.

shown sufficient to constitute an estoppel *in pais: Greenfield Bank* vs. *Crafts.*

If competent circumstantial evidence, tending to prove an adoption and ratification of a forged signature by one who knew all the material facts, has been submitted to a jury under proper instructions, their verdict finding that the adoption and ratification were proved will not be set aside on the ground that the evidence was insufficient to warrant it, for the reason that the paper bearing the forged signature was not presented to the party whose name it bore, and no express declaration was made by him that he would adopt and ratify it, and the circumstances proved might leave the question doubtful in the opinion of the court: *Id.*

If a letter has been sent by the post, there is ordinarily no presumption that it reached its destination and was received by the person to whom it was addressed, though living at the place and usually receiving his letters there; but it should be left to the jury to determine, upon all the evidence, whether it was in fact received: *Id.*

Insurance—Negligence of Insured.—Mere negligence on the part of a person insured, which is the direct cause of a loss by fire, is not a defence to an action upon the policy, if he acted in good faith, and his negligence did not amount to recklessness and wilful misconduct: *Johnson* vs. *Berkshire Ins. Co.*

Railroad—Negligence of Parents of Child—Evidence.—The negligence of a parent or other person who has the care of a child of tender years has the same effect in preventing the maintenance of an action by the child for an injury occasioned by the negligence of others that his own want of due care would have, if the plaintiff were an adult. And to entitle the plaintiff to recover in such case, it is incumbent on him to prove that there was no other culpable cause of the injury than the negligence of the defendants: *Wright* vs. *Malden Railroad Co.*

The fact that a child of two years old is passing unattended across a public street, in a city traversed by a horse railroad, is, in and of itself, necessarily, *primâ facie* evidence of neglect in those who have it in charge: *Id.*

In an action against a horse railroad company to recover for a personal injury caused by their running over with a car a child of two years of age in a public street, in a city, in which the evidence shows that the child was passing across the street unattended, it is sufficient ground for a new trial, after a verdict for the plaintiff, if, in reply to a request by the de-

fendants for an instruction that it is negligence to permit a child of this age to go on a public street, the judge instructs the jury that, if the parents, knowing the position of the child and its danger, had the means of preventing the injury and neglected to use them, and permitted the child to remain in danger, the plaintiff cannot recover; and that the mere fact that a child was passing across the street unattended is not, in and of itself, necessarily such evidence of fault or neglect as entitles the defendants to a verdict: *Id.*

In such action, the plaintiff may introduce in evidence a city ordinance, regulating and limiting the speed of cars upon horse railroads, which has been served upon the defendants, with proof that, at the time of the injury complained of, the defendants' servant was driving at a greater rate of speed: *Id.*

Parent and Child—Emancipation.—An emancipation of a minor child by parol agreement and without consideration is revocable, until acted upon: *Abbott* vs. *Converse.*

Guardian and Ward—Domicil of Ward.—If a minor leaves the domicil of his origin with the consent of his guardian and lives for two consecutive years exclusively in another town, considering it as his home, with no definite intent on the part of his guardian to cause him to return, he acquires a new domicil in the latter place, and his property is properly taxable there: *Kirkland* vs. *Inhabitants of Whately.*

Selectmen of Town—Authority.—The selectmen of a town have no authority to lay out a private way "to be used only during the time of sleighing:" *Holcomb* vs. *Moore.*

Natural Stream—Right of Owner to use of for Mills, &c.—The owner of land over which a natural stream of water flows has a right to the reasonable use of the water for mills or other purposes, whatever may be the effect upon the owners of lands below; and he is not liable to an action for obstructing and using the water for his mill, if it appears that his dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and that his mode of using the water is not unusual or unreasonable, according to the general custom of the country in cases of dams upon similar streams: *City of Springfield* vs. *Harris.*

Railroad Company—Liability as Warehousemen or Common Carriers—Course of Business on Roads along the same Route.—If anything

remains to be done by the consignor of goods or his agents after their delivery to a railroad company, before they are ready for transportation, the company are only responsible for them as warehousemen, and not as com mon carriers: *Judson* vs. *Western Railroad Co.*

If an arrangement or course of business exists between two railroad companies whose roads are upon the same general route, but do not actually connect with each other, by which goods, which have been carried to the termination of one road, and are destined to some point upon or beyond the line of the other, are delivered to the second company with a bill of the expenses already incurred, from which, if found to be correct, a way-bill is made out, the second company are only responsible as warehousemen, and not as common carriers, for goods so received and stored by them, until the delivery of the bill of expenses: *Id.*

SUPREME COURT OF RHODE ISLAND.[1]

Assignment—Conflict of Laws—Trover by Assignees against an Officer for attaching Goods assigned—Damages.—A voluntary assignment of personal property situated in Massachusetts, with preferences, valid in Rhode Island, but void by the laws of Massachusetts, was made in Rhode Island by an insolvent firm composed of members who were citizens of that state, for the benefit of their creditors. After the assignees, who were also citizens of Rhode Island, had taken possession of the property, it was seized by a deputy sheriff in Massachusetts as the property of the assignors, upon a writ of attachment issued against them out of the Superior Court of that state, and delivered to him for service, in which writ the plaintiff was a citizen of Massachusetts, but the cause of action was a promissory note made by the assignors in Rhode Island to a citizen of Rhode Island, who held it at the time of the assignment, and afterwards indorsed it, when overdue, to the plaintiff in the attachment suit. At the time of the attachment the deputy sheriff was notified of the title of the assignees by the person whom they had left in charge of the goods, and on the same day refused to permit one of the assignees to examine the goods attached. The next day the goods were attached by the same deputy as the property of the assignors, in another suit, brought against them in the same court, by a citizen of Massachusetts, upon a debt due to him from the assignors prior to the assignment, in which the Court—overruling a plea in abatement filed by the assignors to the service of the writ, which set up that the property attached did not belong

[1] From Hon. Samuel Ames, Reporter; to appear in the 4th volume of his Reports.

to them—gave judgment against them, and the property was sold, partly under an order of a judge as perishable, and partly on an execution issued in the last-named action—the first having been abandoned—and the proceeds applied by the deputy, first, to the payment of a mortgage upon the goods attached made by the assignors, and the residue to the payment *pro tanto* of the execution. In trover by the assignees against the deputy sheriff, it was *Held*, that inasmuch as the assignment was valid in Rhode Island, and was executed in that state by citizens thereof, it conveyed the personal property of the assignors in Massachusetts, and that its validity could not have been questioned by the first attaching creditor, whose debt was a Rhode Island debt at the time of the assignment, and was bound by it.

Held further, that the title to the goods attached being thus in the assignees, as between them and the first attaching creditor, the taking by the deputy sheriff of the goods upon the first writ against the assignors was tortious, and, whether he knew of the title of the assignees or not, a conversion of the goods in itself; and that, notwithstanding the subsequent attachment of the goods upon a cause of action adjudged in Massachusetts to render them attachable as the property of the assignors, and the application of the proceeds of the goods under judgment to the payment of the debt of the second attaching creditor, the deputy sheriff was liable to the assignees for the value of the goods at the time of the first attachment, deducting therefrom the amount of the mortgage upon the goods paid out of the proceeds thereof, with interest, by way of damages, upon the balance, thereafter: *Hunt* vs. *Lathrop*.

Covenant—Easements—Damages.—Where the tenants in common of a parcel of land laid out into building lots, conveyed to a city by deed-poll a strip of the land running through the centre of the parcel, for a highway, and called it Halsey Street, and in the same deed inserted the following clause:—"And it is hereby expressly understood, covenanted, and agreed by the said grantors, for themselves and their heirs and assigns, respectively, for ever, that no building of any description shall at any time for ever hereafter be erected, placed, or put within eight feet of said Halsey street, or of either side thereof." *Held*, that the clause was a mutual covenant between the tenants in common, and should be construed as a grant in fee to each, of a negative easement in the lands of all, restricting the right to build, within the specified limits, which could be enforced between the tenants in common, their heirs and assigns, at law and in equity;

and could, at least, be used as evidence of the breach of a covenant against all incumbrances, made by the heir at law of one of the tenants in common, in a deed conveying one of the lots which had afterwards been set off to him in severalty: *Greene* vs. *Creighton.*

Damages recoverable of a covenantor against incumbrances on account of the existence of such an easement will not include, although set out and claimed in the declaration, loss arising from the unfitness of the lot, because of the easement, for a particular use in connection with another estate, for which, without communication with the covenantor and without his knowledge, the covenantee purchased it: nor, any sum of money laid out by the covenantee upon the lot to compensate a tenant, whose contract of hiring was made, in ignorance of the easement, long subsequent to the purchase; such damages not arising in the usual course of things from the breach of the covenant, nor such as might reasonably be supposed to have been in the contemplation of the parties at the time of making the covenant, as consequent upon the breach of it: *Id.*

Joint Debtors—Part Payment by one, for his Discharge, Effect of, when made in another State.—A part payment made by one joint debtor, not in *satisfaction of the joint debt,* but merely for his personal discharge therefrom, will not, in the absence of technical difficulties connected with the remedy, operate as a discharge of the other: *Winslow* vs. *Brown.*

Where a note is sued here, and a contract and part payment discharging one of the joint promissors were made in Massachusetts by and between parties resident there, such contract and payment are to be judged, as to their legal effect, by the law of that state; and hence, the part payment will operate, as at common law, to discharge only so much of the debt as it paid, and not the part of the joint debtor discharged, as provided in ch. 114, sect. 2, of the Revised Statutes of Rhode Island: *Id.*

NOTICES OF NEW BOOKS.

STORY'S COMMENTARIES, IN NINE VOLUMES. COMPRISING BAILMENTS; AGENCY; EQUITY JURISPRUDENCE; EQUITY PLEADINGS; BILLS OF EXCHANGE; PROMISSORY NOTES; THE CONFLICT OF LAWS; AND THE LAW OF PARTNERSHIP. With extensive Additions, bringing the References to Cases down to the Present Time.

We beg the indulgence of our readers, in calling attention, at this late day, to the standard law publications of the lamented and admired professor, jurist, and judge, whose name stands at the head of this article.